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No. 03-859

Supreme Court, U.S.
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In the Supreme Court of the United States

ABN AMRO Mortgage Group, Inc.,
a Delaware corporation,
Petitioner,

v.

GREGORY AND MARGARET WEIZEORICK,
Individually, and on behalf of all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The Court of Appeals erroneously held that the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(b) ("RESPA") does not "require that the plaintiff allege that all the parties involved in the fee splitting have knowledge of their participation in, or a conspiracy to join in, an illegal arrangement." (Petition, App. B, p. 13a.) The Seventh Circuit's decision should not be allowed to stand because it effectively transformed RESPA from an anti-kickback statute into a strict liability statute that punishes mere fee collection oversights. The effect of the Court of Appeals' decision is to make RESPA violations out of untold thousands of ordinary errors committed by parties far removed from the closing of a federally related mortgage transaction. This radical expansion of the scope of RESPA is not supported by either the plain language of the statute, or any case-law.

Contrary to the Weizeoricks' assertion, knowledge of the alleged illegal fee split is, in fact, an implicit but essential component of the fee split element of a claim under Section 8(b) of RESPA. The Weizeoricks were required to plead that AAMG knowingly participated in the alleged fee split in order to maintain a cause of action against AAMG under Section 8(b), which they failed to do.

Despite the Weizeoricks' contention, the Court of Appeals' holding in this case, does, in fact, conflict with its earlier decisions. Specifically, the Court of Appeals' decision conflicts with its prior decision in *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001), which held that RESPA requires allegations that the defendant knowingly "***shared*** an unearned fee with a third party" and mere retention of a portion of the total sum paid does not constitute a fee-split for purposes of RESPA. *Id.*, 256 F.3d at 626-27 (emphasis added).

Further, *certiorari* should be granted because the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court – namely, whether Section 8(b) of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(b) can be used to punish a lender who merely receives a fee for a service that it intends to perform but ultimately does not perform without knowing that another party has charged a similar fee. S. Ct. Rule 10(c).

REASONS TO GRANT THE WRIT

I. The Weizeoricks Were Required But Failed to Plead Knowledge As an Implicit But Essential Element of a Claim Under Section 8(b) of RESPA

A. The Weizeoricks Are Required to Plead All the Elements of a Claim

In their Brief in opposition to AAMG's Petition for a Writ of Certiorari, the Weizeoricks argue that there is no basis for review because, even if knowledge is an element of a claim under Section 2607(b) of RESPA, the Weizeoricks were not required to allege that AAMG had knowledge of the purported fee split since, under the federal notice pleading system, "a plaintiff need not plead every element of a cause of action to state a claim." (Response, p. 5.) However, the Weizeoricks' argument misstates the law and is misleading because a plaintiff is required to plead all of the elements of his cause of action.

While the Federal Rules of Civil Procedure require only a "short and plain statement of the claim" asserted and a plaintiff is not required to set out in detail the ***facts*** upon which he bases his claim, a plaintiff is still required under the Rules to plead all the ***elements*** of his cause of action. *See Palda v. General Dynamics Corp.*, 47 F.3d 872 (7th Cir. 1995) (dismissing the plaintiff's action for failing to plead all

the elements of his claim); *Benson v. Cady*, 761 F.2d 335, 338 (7th Cir. 1985) (explaining that "[a]lthough the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts upon which he bases his claim, he must set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery") (internal citations omitted).

The Weizeoricks contend that, under the federal notice pleading requirements, "a plaintiff need not plead every element of a cause of action to state a claim." (Response, p. 5.) In support of this proposition, the Weizeoricks cite *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). However, contrary to the Weizeoricks' assertion, neither *Swierkiewicz* nor *Leatherman* stands for the proposition that a plaintiff need not plead the ***elements*** of his purported cause of action or claim. Rather, *Swierkiewicz* and *Leatherman* state only that a plaintiff need not set out in detail the ***facts*** upon which he bases his claim. *Swierkiewicz*, 534 U.S. at 511; *Leatherman*, 507 U.S. at 168.

Contrary to the Weizeoricks' assertion, knowledge of the alleged illegal fee split is, in fact, an implicit but essential component of the fee split element of a claim under Section 8(b) of RESPA. The Weizeoricks were required to plead that AAMG knowingly participated in the alleged fee split in order to maintain a cause of action against AAMG under Section 8(b), which they failed to do.

B. Knowledge is an Implicit and Essential Component of a Fee Split That Must Be Alleged

Section 8(b) of RESPA provides:

Splitting charges. No person shall give and no

> person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

In order to state a claim for violation of Section 8(b) of RESPA, the Weizeoricks must allege that AAMG knowingly "***shared*** an unearned fee with a third party." *Echevarria*, 256 F.3d at 627 (emphasis added). The mere retention of a portion of the total sum paid ***does not*** constitute a fee split for purposes of RESPA. *Id.* at 626-27.

The Weizeoricks repeatedly assert that AAMG "concedes in the Petition that knowledge is not an element of a claim under § 2607(b) of RESPA." (Response, pp. 1, 3, 7.) However, AAMG did no such thing. In its Petition, AAMG actually stated that "[c]ontrol over the closing and knowledge of duplicative fee collection, while not separate elements of a RESPA claim, are indicia of whether the accused party was engaged in the type of improper kick-back or fee-split prohibited by RESPA." (Petition, p. 10.)

The case of *Christakos v. Intercounty Title Co.*, 196 F.R.D. 496 (N.D. Ill. 2000), was relied upon by the Weizeoricks in opposition to AAMG's Petition and cited by the Court of Appeals in support of its novel holding. However, the *Christakos* case actually proves AAMG's point that knowledge of the duplicative payment is an implicit and essential component of a fee split or sharing that must be alleged in order to state a claim for violation of Section 8(b) of RESPA. The *Christakos* case in no way stands for the proposition that a lender may be punished for merely charging a duplicative, unearned fee.

In the *Christakos* case, Ms. Christakos refinanced her home and closed the transaction, with the title company acting

as settlement agent at the closing. As in our case, the prior mortgagee issued a payoff letter which included a charge for recording the release of the existing mortgage. At closing, the title company charged an additional fee for the same service. Then, in a situation totally ***opposite*** from that found in our case, ***the existing lender***, not the title company, recorded the release of Ms. Christakos' mortgage. The court held that Ms. Christakos' complaint stated a viable RESPA claim ***against the title company that had control over the closing*** and knowledge of all fees being charged.

Significantly, the *Christakos* holding was based upon allegations that the two recordation fee payments "were made from the ***same pool of funds*** from the loan proceeds over which [the title company], as settlement agent, had ***control and directed payments made from***." 196 F.R.D. at 503 (emphasis added). In other words, in *Christakos*, the title company charged a fee to record the release of the existing mortgage even though it ***simultaneously*** was collecting a fee for the prior mortgagee to record the same release. Thus, the title company knowingly charged the owner two fees for the identical service that could only be performed once.

In contrast, the Weizeoricks' Complaint in the instant case does not allege that the moneys paid to AAMG and to the title company were ever "pooled" by AAMG in any way, that the money paid to the title company was ever in AAMG's control or, that AAMG ***knew*** that the title company even received a recording fee.[1] Accordingly, the fee-split required to invoke

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[1] Contrary to the Weizeoricks' contention, the Complaint does not contain allegations that AAMG knowingly engaged in conduct prohibited under Section 8(b) of RESPA. (Response, p. 5.) At this late date, in response to AAMG's Petition, the Weizeoricks attempt to amend their Complaint through arguments of counsel. However, the Weizeoricks' improper attempt to retroactively alter the record is of no avail. Moreover, the

RESPA is plainly lacking here. Unlike the title company in *Christakos*, AAMG did not have control over the settlement of the sale, was not even a party to that settlement and had no knowledge of any terms of the settlement, including the fact that the title company was going to charge a fee already included in AAMG's Payoff Statement, as AAMG issued its Payoff Statement on July 18, 2000, six days prior to the July 24, 2000 closing.

Contrary to the Weizeoricks' assertion, knowledge of the alleged illegal fee split is, in fact, an implicit but essential component of the fee split element of a claim under Section 8(b) of RESPA. The Weizeoricks were required to plead that AAMG knowingly participated in the alleged fee split in order to maintain a cause of action against AAMG under Section 8(b), but failed to do so.

II. The Court of Appeals' Decision Impermissibly Expanded the Scope of Liability Under § 8(b) of RESPA

The Court of Appeals acknowledged that subjecting an existing lender to RESPA liability for mere wrongful fee collection "would radically, and wrongly, expand the class of cases to which RESPA applies." (Petition, App. B, p. 9a.) However, despite this acknowledgement, the Court of Appeals held that RESPA does not "require that the plaintiff

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referenced allegation does not support the inferences urged by the Weizeoricks. The Weizeoricks' allegation that the title company and not AAMG filed the release of the Weizeoricks' mortgage does not support the conclusion that AAMG knew of the allegedly wrongful fee split. AAMG charged the recording fee six days prior to the closing of the Weizeoricks' real estate transaction and had no way of knowing that the title company later would record the instrument. The only reasonable inference is that AAMG received an unearned fee, which is not, in itself, actionable under Section 8(b).

allege that all the parties involved in the fee splitting have knowledge of their participation in, or a conspiracy to join in, an illegal arrangement." (Petition, App. B, p. 13a.) By holding that Section 8(b) of RESPA can be used to punish parties with no knowledge that their fees are duplicative of separate fees charged by others, the Court of Appeals effectively transformed RESPA from an anti-kickback statute into a strict liability statute that punishes mere fee collection oversights. The effect of the Court of Appeals' decision is to make RESPA violations out of untold thousands of ordinary errors committed by parties far removed from the closing of a federally related mortgage transaction. This radical expansion of the scope of RESPA is not supported by either the plain language of the statute, or any case-law.

In an attempt to justify the Court of Appeals' radical expansion of the scope of RESPA's reach, the Weizeoricks argue that the Court of Appeals' statement that knowledge is not an element of a claim under Section 8(b) "does not expand the scope of that statute because there is no basis in the first instance for concluding that § 2607(b) requires proof of knowledge." (Response, p. 7.) However, in making this argument, the Weizeoricks notably fail to address the fact that the Court of Appeals' holding conflicts with the common understanding that RESPA is fundamentally an anti-kickback statute. *See Krzalic v. Republic Title Co.*, 314 F.3d 875, 877 (7th Cir. 2002) (finding that Section 8(b) of RESPA is an "anti-kickback provision"); *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 270 (7th Cir. 1985) (holding that RESPA is fundamentally "an anti-kickback statute").

The Weizeoricks argue that the Court of Appeals' holding in *United States v. Gannon*, 684 F.2d 433 (7th Cir. 1981), somehow supports the Court of Appeals' finding that Section 8(b) of RESPA can be used to punish a lender who merely receives a fee for a service that it intends to perform but

ultimately does not perform without knowing that another party has charged a similar fee. However, *Gannon* does not stand for that proposition.

In *Gannon*, the defendant, a counterman in the Torrens section of the county recorder of deeds, charged bank employees an extra two or three dollars above the statutory fee to process applications promptly. Based on this conduct, the Government filed an action against the defendant, asserting that the defendant had violated Section 8(b) of RESPA. In defense of his actions, the defendant argued, among other things, that he could not be held liable under Section 8(b) because he had no knowledge that the extra payments were being passed onto the banks' customers. The Court rejected the defendant's argument. The Court held that there was no support in the legislative history of Section 8(b) for the defendant's contention that the Government was required to prove that ***the defendant knew that the extra payments were being paid directly by the banks' customers***. 684 F.2d at 440.

III. The Court of Appeals' Decision Conflicts With Its Earlier Decision in *Echevarria v. Chicago Title & Trust Co.*

Contrary to the Weizeoricks' assertion, the Court of Appeals' holding in this case, does, in fact, conflict with its earlier decisions. Specifically, the Court of Appeals' decision conflicts with its prior decision in *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001).

In *Echevarria*, as in the present case, the plaintiffs argued that a fee-split need not be literal for purposes of RESPA, but that, rather, fees are split whenever two entities receive fees for a service and the sum total of those fees is more than the service actually cost. 256 F.3d at 626. Specifically, the plaintiffs in *Echevarria* argued that a $45 fee that they paid to

their title company "was illegally split when [the title company] paid a third party, the County Recorder, a portion of the fees . . . and retained the overcharges . . . for itself." *Id.* According to the plaintiffs, a "focus on the whole $45.00" revealed a fee split because $45 was the total amount plaintiffs paid for recordation of the release of their mortgage, and the defendant, in the end, retained a portion of that sum. *Id.* However, the Court of Appeals rejected the plaintiffs' argument, explaining that RESPA requires allegations that the defendant actually "**shared** an unearned fee with a third party." *Id.* at 627 (emphasis added). The Court held that mere retention of a portion of the total sum paid does not constitute a fee-split for purposes of RESPA. *Id.*, 256 F.3d at 626-27.

In contrast to its holding in *Echevarria*, the Court of Appeals held here that Section 8(b) of RESPA can be used to punish an existing lender whenever a title company, who controls the settlement proceeds, receives a **separate fee** for the same service **without the knowledge of the lender**. Plainly, the Court of Appeals' holding here conflicts with its prior decision in *Echevarria*.

IV. This Case Clearly Meets the Criteria for Review Under Supreme Court Rule 10(c)

In their Brief in opposition to AAMG's Petition, the Weizeoricks argue that *certiorari* should be denied because this case fails to meet those criteria for review under Supreme Court Rule 10 that are triggered by a conflict between a court of appeals decision and a decision of another court of appeals, a state court of last resort or this Court. (Response, p. 3.) However, under the plain language of Rule 10, *certiorari* also may be granted where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an

important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c).

Here, the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court – namely, whether Section 8(b) of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(b) can be used to punish a lender who merely receives a fee for a service that it intends to perform but ultimately does not perform without knowing that another party has charged a similar fee.[2]

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit which effectively transformed RESPA from an anti-kickback statute into a strict liability statute that punishes mere fee collection oversights and made RESPA violations out of untold thousands of ordinary errors committed by parties far removed from the closing of a federally related mortgage transaction.

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[2] Contrary to the Weizeoricks' contention, the question presented by AAMG's Petition is not whether the Court of Appeals correctly found that the Weizeoricks' Complaint states a claim under the notice pleading requirements of the Federal Rules of Civil Procedure. Rather, the issue here is whether, in holding that the Weizeoricks have stated a claim under Section 2607(b) of RESPA, the Court of Appeals correctly found that Section 8(b) of RESPA can be used to punish a lender who merely receives a fee for a service that it intends to perform but ultimately does not perform without knowing that another party has charged a similar fee.

Respectfully submitted,

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